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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KAREN G. SILKWOOD, by the Administrator of her estate, BILL M. SILKWOOD, et al.,

Petitioners,

v.

THE KERR-McGEE CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION OF RESPONDENTS

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BRIEF IN OPPOSITION OF INDIVIDUAL KERR-McGEE RESPONDENTS

## QUESTION PRESENTED

**Whether the court below correctly applied this Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in holding that allegations of a conspiracy among company officers and employees against Karen Silkwood and other employees in retaliation for their activities in attempting to organize a labor union and in filing complaints against the company with the Atomic Energy Commission fail to state a claim under 42 U.S.C. §1985(3)[1] because the required racial or perhaps otherwise class-based invidiously discriminatory animus against these employees was not alleged?**

[1] The most recent codification of this statute in the United States Code designates this provision as 42 U.S.C. §1985(c) (1976). However, since virtually all of the cases refer to it as §1985(3), that reference will be used in this brief.

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## STATEMENT OF THE CASE

This case is an outgrowth of a labor dispute. The representatives of Karen Silkwood, who died almost two years before the action was filed and who was a company employee and a union member, have attempted to piece together an outlandish conspiracy among officers, directors, and employees of the Kerr-McGee Corporation, allegedly to deny a panoply of Silkwood's rights during the course of labor negotiations at a Kerr-McGee facility.

The complaint herein was filed in 1976 and contains three counts. It is included in the Petition here as Appendix E. The first two counts are involved here and purport to allege conspiracies to violate Silkwood's civil rights and claimed violations of the Ku Klux Klan Act, 42 U.S.C. §1985(3). The third count involved a personal injury claim. [2]

It is alleged in the two §1985(3) claims that a number of officers, directors and employees of Kerr-McGee Corporation (the "individual Kerr-McGee respondents") [3] and others conspired to deprive Silkwood and certain other persons employed at Kerr-McGee's Cimarron nuclear fuel manufacturing facility of various constitutional rights. The so-called class identified in the first claim was Silkwood and "other persons employed at Kerr-McGee Corporation's Cimarron, Oklahoma nuclear power facility who were endeavoring to organize a lawful labor union" (Complaint, ¶35, p. 15e of Appendix E). In the

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[2] This third claim was tried to a jury, resulting in a verdict for plaintiff. The judgment is currently on appeal in the Tenth Circuit, and is not involved here.

[3] The individual Kerr-McGee respondents are identified on the cover. F. C. Love and Peter Colefax have died since the filing of the complaint. Kerr-McGee Corporation is not a party to the section 1985(3) claims.

second claim the class was alleged to be Silkwood and "other persons employed at Kerr-McGee Corporation's Cimarron facility who had filed complaints against the corporation under the Atomic Energy Act" (Complaint, ¶41, p. 21e of Appendix E).

After more than a year of discovery, respondents filed a motion for summary judgment on the two §1985(3) claims, arguing that the complaint failed to state a claim upon which relief could be granted and that there was no evidence to support the allegations put forth in those two counts. The district court elected to decide only the legal issues raised by these motions and held that the complaint failed to state a claim under 42 U.S.C. §1985(3), relying primarily upon this Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). The Court of Appeals for the Tenth Circuit affirmed.

In addition to making a number of factual assertions that are neither supported by the record nor true in fact,[4] Petitioners' Statement of the Case grossly misstates the holdings of both the district court and the Tenth Circuit. Matters which Petitioners claim are dicta in the district court opinion (Pet. 6-7) are in fact a part of the holding. More importantly, contrary to the assertions of Petitioners, the Tenth Circuit did *not* expressly rule that §1985(3) protected each of the two classes described in the complaint, did *not* hold

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[4] Petitioners' carelessness with respect to factual assertions is well illustrated by their reference to an untranscribed deposition which was not part of the record below ("deposition of Edwin Youngblood," Pet. 4, 19). In addition, they rely for one of their most scurrilous assertions upon a 1981 novel ("R. P. Rashke, The Killing of Karen Silkwood," Pet. 5). While we vehemently dispute Petitioners' contentions regarding the facts, we will not discuss them herein because this matter is before this Court solely on the issue of whether the court below properly dismissed the complaint for failure to state a claim.

that the "intent of Congress" was that "these classes be protected under §1985(3)," and did *not* "set forth half a dozen separate reasons why members of these two classes of citizens were protected under §1985(3)" (Pet. 7-10).

## SUMMARY OF ARGUMENT

There is no reason for this Court to grant a writ of certiorari in this case. The holdings asserted by Petitioners were never made by the court below. The Tenth Circuit's opinion is a well-reasoned application of the decisions of this Court and other federal courts, resulting in a quite narrow holding compelled by a reading of the complaint in light of this settled law.

To the allegations in Petitioners' complaint, the Tenth Circuit applied the holding in this Court's opinion in *Griffin v. Breckenridge*, that an indispensable element of any §1985(3) claim is the presence of a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102. The Tenth Circuit properly held that the feud alleged here was merely a private one and that the hatred allegedly harbored against Silkwood did not arise from any general prejudice or animus against any class of which she was a member but rather from the activities in which she and her associates were engaged during the labor dispute.

There is no conflict between the decision below and the opinion of a panel of the Fifth Circuit in *Scott v. Moore*, 640 F.2d 708 (5th Cir. 1981).[5] Rather the Tenth Circuit here and the Fifth Circuit panel in *Scott* both

[5] At the time of filing this brief the panel opinion of March 26, 1981 in *Scott v. Moore* was not final and was pending on Petition for Rehearing filed April 9, 1981.

applied the same body of law to two completely different factual situations and arrived at narrow, non-conflicting holdings with respect to each of them. Further, Fifth Circuit decisions before and after *Scott* demonstrate no conflict exists between the two Circuits.

Finally, the Tenth Circuit did not invade the province of the jury or otherwise deny Petitioners' procedural rights. As the district court had done, the Tenth Circuit merely examined Petitioners' complaint and found it lacking, holding that the private disputes alleged in the first two counts are not within the scope of coverage of §1985(3), and that to hold otherwise would make the statute applicable to all conspiratorial interferences with the rights of others.

## ARGUMENT

### I.

### THE DECISION BELOW RAISES NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT.

The Tenth Circuit held that to state a claim under §1985(3), the conspiracy must have been motivated by prejudice against a class, rather than by prejudice against particular individuals (637 F.2d at 748). In the words of the court below, the conspiracy must have been motivated by prejudice "against a class *qua* class." (Id. at 748).

As the Tenth Circuit stated, this case does not involve any general prejudice which transcends the immediate dispute. Instead, the hatred allegedly harbored against Silkwood and her associates arose solely out of their particular activities during the course of the dispute and not from their membership

in any class. Accordingly, the court held that such a dispute, being essentially private in nature, was not within the scope of §1985(3). (Id. at 748).

In so holding, the Court of Appeals merely applied the well settled principles established by this Court in *Griffin v. Breckenridge, supra.* There this Court held that §1985(3) extends to private conspiracies, but carefully limited the scope of the statute to those conspiracies motivated by racial or perhaps some other class-based, invidiously discriminatory animus, stating:

> "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' . . . The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 101-102. (Emphasis in original).

In *Griffin* the Court defined the requisite motivation as an animus "to deprive the Petitioners of the equal enjoyment of legal rights *because of their race,*" 403 U.S. at 103 (Emphasis supplied). In other words, the conspiratorial discrimination must be directed at an individual *because of his membership in a class* defined by "invidious" criteria.

This is precisely the holding of the Tenth Circuit. The dismissal of Petitioners' §1985(3) claims was affirmed because it was apparent from the complaint that the alleged actions of Respondents were directed at Silkwood and her associates because of their union organizational activities and their complaints to the Atomic Energy Commission. The complaint does not allege that Silkwood and her associates were discriminated against because of some odious or irrational prejudice which the defendants harbored against a class of which Silkwood and her associates were members; instead, the complaint alleged that Silkwood and her associates were retaliated against because of their *activities.* Thus, the Tenth Circuit merely followed the settled law established in *Griffin v. Breckenridge.*

Petitioners claim the court below held that each of the two classes described by Petitioners are protected by §1985(3) but then "irrationally" concluded that the protection provided by §1985(3) goes only to redress injury from conspiracies aimed at mere passive membership in the class rather than those aimed at members actively furthering the objectives of the class. The confusion in this argument arises because Petitioners ignore the *two* functions the Tenth Circuit performed in its opinion. The first was to determine whether it had subject matter jurisdiction; the second was to determine whether a claim had been stated. The pages cited for the supposed holding that the two alleged classes are covered by §1985(3) (pp.

746-47), are plainly marked "JURISDICTION" and the Tenth Circuit was there considering whether a federal court has jurisdiction to decide this aspect of a labor dispute or whether exclusive jurisdiction lies in the National Labor Relations Board.

As this Court has held many times, the question of jurisdiction has nothing to do with whether a complaint states a claim and must be decided before the court may even address the sufficiency of the complaint. *Baker v. Carr*, 369 U.S. 186 (1962); *Bell v. Hood*, 327 U.S 678 (1946); *Binderup v. Pathe Exchange*, 263 U.S 291 (1923).

After deciding that a federal court does have independent jurisdiction to consider the *types* of claims raised by Petitioners (p. 747), the Tenth Circuit then proceeded, under the heading "Section 1985(3)," to address the question of whether Petitioners' complaint stated a cognizable claim under the statute. Even in this section of the opinion, however, the court did not hold that Petitioners' two asserted "classes" were proper for purposes of §1985(3). After noting the numerous uniform holdings by other federal courts that union-related disputes simply do not meet the requirements of §1985(3), (p. 748), the Tenth Circuit said:

> "*Even if* a union or group which has particular views on nuclear safety can be a class within the meaning of section 1985(3), no cause of action is stated here." 637 F.2d at 748 (Emphasis supplied).

The court proceeded to its holding that a complaint must show an invidiously discriminatory animus on the part of defendants and that Petitioners' claims simply do not present the motivating animus required by §1985(3).

The Tenth Circuit did not hold, as asserted by Petitioners, that Silkwood and other employees constituted a "protected class." For that reason the Petitioners' first question presented is not presented by the decision of the Tenth Circuit, but rather is fashioned out of "whole cloth" by Petitioners.

## II.

## THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THE OTHER COURTS OF APPEALS.

Petitioners claim there now exists a conflict between the Tenth Circuit in this case and the Fifth Circuit in *Scott v. Moore, supra.*[6] Since *Scott,* the Fifth Circuit, *en banc,* has considered *Griffin* and its application. In *Kimble v. D. J. McDuffy, Inc.,* 648 F.2d 340 (5th Cir. *en banc* 1981), the Fifth Circuit made clear that its application of *Griffin* is not in conflict with the decision of the Tenth Circuit in this case, or with the decisions of other Circuits. In *Kimble,* the court stated:

> "What *Griffin* stands for, and what we now hold, is that Section 1985 was intended to encompass only those conspiracies motivated by animus against the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act. Certainly 'conspiracies' against workers who file personal injury or workmen's compensation claims are not among those Congress was trying to deter in 1871." 648 F.2d at 347, n.9.

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[6] The opinion in *Scott v. Moore* was issued by a panel of the Fifth Circuit on March 26, 1981. As of the time of printing this brief (August, 1981), the case was pending on Petition for Rehearing. (Rehearing by the court *en banc* has been suggested by appellants and no order has been entered.)

This is completely in accord with the Tenth Circuit here. Further, a comparison of the opinions in *Scott* and this case shows that no conflict exists. In the first place, the Tenth Circuit made no holding in this case as to the sufficiency of anti-union animus as a basis for a §1985(3) claim, although it pointed out that other courts have uniformly found this insufficient. 637 F.2d at 748. The basis of the decision was that a private feud was involved, arising out of the activities of Silkwood and her associates.

As with the opinion in this case, Petitioners assert holdings were made in the *Scott* opinion which simply are not there. Petitioners claim that:

> "The Fifth Circuit ... expressly declared that ... anti-union organizers who were discriminatorily deprived of their constitutional rights by an invidiously discriminatory, anti-civil-rights conspiracy *because of their activities* undertaken to dissuade workers from joining a lawful labor union, *were* entitled to protection under §1985(3)." (Emphasis in original, Pet. 15).

A search of the opinion in *Scott*, reveals there is nothing in that case involving "anti-union organizers" or activities by them to dissuade workers from joining a lawful labor union.

What is involved in *Scott*, which in no way conflicts with this case, is a situation of mob violence against non-union employees (and their employer) in a "union town," where there was pervasive hatred of non-union workers, at a job-site where there was no labor organizing activity, and thus no question of any labor dispute or the applicability of national labor laws. The Fifth Circuit held that in such a factual setting, the status of "non-union worker" did establish a proper class under §1985(3), and that the non-

union animus in the absence of any labor dispute thus met the statute's requirements. It stressed that it had no intention of holding that every union or non-union controversy creates a §1985(3) claim, or that every instance of violence arising in the context of a labor dispute would do so (723). The court said that unionism or non-unionism in and of itself does not create a covered class (724). The court also emphasized the importance of the fact that there was present no campaign to organize employees (724). The narrow holding of the court was:

> "Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers and their employer of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence." 640 F.2d at 731.

The instant case presents the precise factual situation which the Fifth Circuit distinguished in *Scott v. Moore.* Here Silkwood and her associates were involved in a union organizational campaign, and they were allegedly the victims of several unfair labor practices committed by their employer. They were not discriminated against because of their political beliefs or associations, rather, they were allegedly retaliated against because of their activities. Accordingly, the Fifth Circuit's opinion does not conflict with the Tenth Circuit's opinion in this case.

Moreover, the decision here is in accord with decisions of other courts of appeals which have uniformly held that to state a claim under §1985(3), the discrimination against the plaintiff must have been motivated by an invidiously discriminatory animus against a class of which he is a member, rather than

by animosity toward the plaintiff or in retaliation for his activities. See, *e.g., Harrison v. Brooks,* 519 F.2d 1358, 1360 (1st Cir. 1975); *Alexander v. Unification Church of America,* 634 F.2d 673 (2d Cir. 1980); *Carchman v. Korman Corp.,* 594 F.2d 354 (3d Cir. 1979), *cert. denied,* 444 U.S. 898 (1979); *Hughes v. Ranger Fuel Corp.,* 467 F.2d 6, 10-11 (4th Cir. 1972); *Kirkpatrick v. Seligman & Latz, Inc.,* 636 F.2d 1047 (5th Cir. 1981); *Ohio Inns, Inc. v. Nye,* 542 F.2d 673, 678-79 (6th Cir. 1976); *Askew v. Bloemker,* 548 F.2d 673, 678 (7th Cir. 1976); *Arnold v. Tiffany,* 487 F.2d 216, 218-19 (9th Cir. 1973), *cert. denied,* 415 U.S. 984 (1974); *Lessman v. McCormick,* 591 F.2d 605, 608 (10th Cir. 1979); and *McCord v. Bailey,* 636 F.2d 606 (D.C. Cir. 1980). As noted in *Harrison v. Brooks, supra:*

> "The requirement that the discrimination be 'class-based' is not satisfied by an allegation that there is a conspiracy which affected the interests of a class of persons similarly situated with the plaintiffs. Rather, the Complaint must allege facts showing that the defendants conspired against the plaintiffs *because of* their membership in a class and that the criteria defining the class were invidious." 519 F.2d at 1359-60 (Emphasis supplied).

Respondents are not aware of any court of appeals case holding to the contrary.

Furthermore, the cases are uniform in holding that classes for purposes of §1985(3) cannot be defined by the activities of their members. See, *e.g., Carchman v. Korman Corp., supra,* (tenant organizers); *Arnold v. Tiffany, supra,* (organizers of a newspaper dealers association); *Hughes v. Ranger Fuel Corp., supra,* (persons reporting violations of water pollution laws); *Bricker v. Crane,* 468 F.2d 1228 (1st

Cir. 1972) (doctors who testify in malpractice suits against other doctors); *Lessman v. McCormick, supra,* (debtors); and *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. *en banc* 1977) (bankrupts).

The classes which have been upheld under §1985(3) have been defined by intrinsic characteristics or qualities such as race, ethnic origin, sex, religion or political affiliation, and the conspiracies have all been motivated by odious or irrational prejudice against the characteristic which defines the class. See, *e.g., Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971) (race); *Marlowe v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973) (ethnic origin and religion); *Life Insurance Co. of N. Amer. v. Reichardt,* 591 F.2d 499 (9th Cir. 1979) (women); and *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975) (political affiliation).

Perhaps the case most closely analogous to this case is *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980). There the Sixth Circuit held that a class of union members retaliated against by their employer for reporting safety violations to the Occupational Safety and Health Administration was not a cognizable class under §1985(3) because the action of the defendants was directed at the individuals in retaliation for their activities, not because of any class-based animus.

The complaint here does not allege the respondents discriminated against Silkwood and her associates because of their membership in a union, but because of their organizational activities and efforts to file complaints against their employer. The complaint does not describe an animus against all members of the union; rather it alleges an animus only against Silkwood and those who joined in her activities. Even if there were an allegation of anti-union animus, the complaint would still fail to state a claim under §1985(3). The lower federal courts that have

considered the question have all held that anti-union animus is not the kind of class-based invidiously discriminatory animus which this Court has required as the basis of a claim under §1985(3). See *Taylor v. Brighton Corp., supra; Iowa Beef Processors, Inc. v. Gorman*, 476 F.Supp. 1382 (N.D. Ia. 1979); *Ferdnance v. Automobile Transport, Inc.*, 83 CCH Labor Cases ¶10,402, 97 L.R.M. 2473, 2476 (E.D. Mich. 1978). Similarly, except in the special circumstances present in *Scott v. Moore, supra*, the courts have also held that animus against non-union workers is insufficient under §1985(3). See *Bova v. Pipefitters and Plumbers Local 60, AFL-CIO*, 554 F.2d 226, 228 (5th Cir. 1977); *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980); and *Western Telecasters, Inc. v. California Federation of Labor, AFL-CIO*, 415 F.Supp. 30, 33 (S.D. Cal. 1976).

## III.

## THE COURT OF APPEALS FOLLOWED PROPER PROCEDURE IN THIS CASE.

As a final ground for certiorari, Petitioners assert this Court should exercise its extraordinary supervisory powers over the lower federal courts because the Tenth Circuit allegedly followed improper procedures, including "invad[ing] the province of the jury," by affirming the dismissal of the complaint. (Pet. 16-20). Neither the district court nor the Tenth Circuit acted improperly in assessing the sufficiency of Petitioners' claim in response to Respondents' motions for summary judgment after permitting nearly two years of discovery. The Federal Rules of Civil Procedure provide for such procedures and this Court has sanctioned their use in determining the legal sufficiency of claims filed in federal courts. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978), *First National Bank of Arizona v. Cities Ser-*

*vice Co.*, 391 U.S. 253 (1968); *Warth v. Seldin*, 422 U.S 490 (1975).

Both courts below read the complaint and ruled that it failed to state a claim because it did not in any way allege the animus against a class of the type required by §1985(3). Petitioners claim that the complaint on its face charges Respondents with "*discriminatorily* depriving Karen Silkwood and her associates" of their federally-guaranteed constitutional rights. (Pet. 17). The problem with Petitioners' argument, however, is that the complaint plainly does not allege Respondents "discriminatorily" did anything. The broadest reading of Petitioners' complaint and supporting motion papers, which was given by both courts below,[7] shows that no class-based animus on the Respondents' part exists or was alleged. Petitioners presented no issue for jury resolution. They simply failed to state a claim.

What both courts below did here is not only proper but highly desirable. This case is merely one more of a mushrooming stream of cases in which claimants attempt to take an essentially private dispute involving alleged tortious conduct belonging in the state court or some other forum and convert it into a federal civil rights claim in a federal court. If the federal courts are compelled to try each of these cases before they can determine that no cause of action under §1985(3) exists, they will be hopelessly bogged down with hundreds of cases which simply do not belong in federal court. The procedure followed by the courts below in assessing allegations of Petitioners' complaint was exemplary and certainly does not constitute procedural impropriety requiring the invocation

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[7] Contrary to Petitioners' claim (Pet. 20), the record in this case was before the Court of Appeals below, just as it was before the district court.

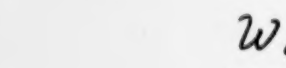
of the federal judicial supervisory powers of this Court.

## CONCLUSION

Respondents respectfully submit that this case is not an appropriate one for the exercise of this Court's judicial discretion to review on writ of certiorari. There are no special or important reasons for reviewing the decision of the Tenth Circuit, which is in complete accord with applicable decisions of this Court and is not in conflict with the decisions of other circuits on the same matter. Reversal of the Tenth Circuit's decision would require a holding that classes defined by the activities of their members constitute protected classes under §1985(3). This would vitiate the limitation which this Court imposed in *Griffin v. Breckenridge* to prevent §1985(3) from becoming a general federal tort law for the redress of *all* conspiratorial interferences with the rights of others. If this complaint states a §1985(3) claim, then any discrimination or retaliation by two or more persons against any one because of his conduct would sound a §1985(3) claim. Moreover, to so hold would raise the serious constitutional problems alluded to in *Griffin*, and would seriously disrupt the operation of the carefully integrated statutory scheme of the federal labor laws. Finally, there is no need to expand §1985(3) to provide a remedy in this case, since the combination of the federal labor laws and state tort law provides completely adequate remedies for the conduct alleged in the complaint.

Since the case was correctly decided by the Tenth Circuit, the Petition should be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 1981, three copies of this Brief in Opposition to Petition For A Writ Of Certiorari were mailed, postage prepaid, to each of the following:

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I further certify that all parties required to be served have been served.

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